

# MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?

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**M**ed-arb is the melding of two well-established processes for conflict resolution into one hybrid process. **Mediation** and **Arbitration** are used in conjunction with one another and, in the truest form of med-arb, the same third-party neutral plays the role of both mediator and arbitrator. In this paper, the term med-arb refers to this pure form that uses the same neutral, and is distinct from the common process where different neutrals are used in a mediation phase and an arbitration phase. Our goal is to educate the reader, stimulate thinking about the med-arb process, and probe the questions that conflict professionals should explore with their clients when med-arb is considered as a process choice for resolving a specific dispute. People in conflict are looking for a resolution process that is fair, consistent, transparent, inexpensive, quick, and in some way allows them to tell their own story. Med-Arb offers parties the ability to obtain a definite resolution of a particular dispute, with reduced cost, efficient process, and flexibility to pursue consensual settlement prior to or during binding arbitration. In the right circumstances, med-arb may represent the process that best serves the interests for your clients.

## What is Arbitration?

Arbitration is a private dispute resolution process where parties in conflict hire a third party neutral(s) to hear their stories, look at the facts, and make a decision for them on how the dispute will be resolved. Arbitration is essentially contractual and is generally used in a wide range of commercial settings to deal with conflicts that arise under contractual agreements (Lewicki 440). The most common settings for arbitration include construction, manufacturing and other commerce, international trade,

labor-management, employment, public sector, and insurance (Id.). Arbitration has particular application when issues are specialized and technical, such as in a construction project when the costs of building defects need to be allocated among the architect, engineer, contractor, and property owner (Hoellering 23).

The Federal Arbitration Act of 1925 established a national policy in the U.S. allowing contractually based private arbitration to take the place of standard court procedure and be judicially enforceable (Oehmke 305, FAA 1990). The Uniform Arbitration Act, promulgated in 1956 and revised in 2000, has been adopted in nearly every state to provide guidance on the uses of arbitration and the enforceability of arbitral awards (UAA 2000). Finally, a number of international trade agreements, most notably the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted through the United Nations in 1959, require courts of contracting nations to recognize and give effect to private arbitration agreements and enforce arbitral awards (Onyema 411-13).

Arbitration is a private, less formal, and more expeditious form of adjudication (judicial procedure to hear a dispute) that enables disputing parties to reach a binding decision similar to a court judgment, while relieving the courts of case overload. In some instances, the parties have the chance prior to the arbitration to decide whether the results will be binding upon them or non-binding. In other contexts, binding arbitration may be contractually binding despite one party's lack of bargaining power, as when consumers "agree" to be locked into binding arbitration (in lieu of a court remedy) via their purchase contracts with commercial vendors (Lipsky 12). A binding process means the results of the arbitration are a contract between the parties that is enforceable in a court of law. A non-binding arbitration follows all the same steps as a

binding process except that the decision by the arbitrator is considered a suggestion. Parties are free to use the suggested decision to make their agreement final or to simply use the process as a dress rehearsal to get a sense of what may happen in a formal court procedure. Unlike mediation, information uncovered in arbitration is not typically held as confidential (Oehmke 30). Although an arbitrator may be called into court if there is compelling evidence of unfairness, or a denial of justice, the merits and methods of decisions made by the arbitrator are rarely questioned by the courts (Oehmke 51).

### Differences Between Arbitration and Mediation

Arbitration and mediation are different processes with different purposes. The fundamental difference lies in *who makes the final decision* – a neutral third party or the parties themselves. In traditional arbitration, a third party neutral conducts an adjudicative process similar to a court proceeding to reach a decision according to the law of the contract (Henry 396-97). The arbitrator hears arguments presented by the parties, accepts evidence, listens to witnesses called by the parties, and does not address underlying issues and interests unless raised by the parties (Bartel 664). As an adjudicative process, arbitration emphasizes the ability of each party to represent factual information (evidence) and highlight relevant standards so that the impartial third party (arbitrator) can reach a sound decision based on principles and criteria set forth in contract, law, policy, and common practice.

In contrast, in mediation the third party neutral's role is to *facilitate negotiation*, and the parties themselves make the final decision as to how to resolve the dispute. Mediation's different orientation emphasizes different skills. "Mediation is a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship. A mediator facilitates negotiation between the parties to enable better communication, encourage problem solving, and develop an agreement or resolution by consensus among the parties" (Menkel-Meadow 266). Under an interest-based and party-centered model of mediation, the role of im-

partial third party is to clarify the issues and especially the underlying interests that "lie at the heart" of the dispute (Friedman and Himmelstein 540-547). The mediator may place as much emphasis on personal, practical, or business related aspects of the conflict as on the legal aspects (Id.). The mediator may help the parties explore subjective dimensions of the conflict, such as beliefs and assumptions, emotions (anger and fear), the need to assign blame, and the desire for self-justification, which normally would not be considered relevant in an arbitration (Id.). All of the information discussed in mediation is confidential, and the mediator cannot be drawn into litigation as a result of information uncovered in mediation.

While mediation and arbitration are fundamentally distinct processes, there are different styles and forms of mediation (e.g., directive, evaluative, or transformative) as well as different variations of arbitration (Hoffman 14). Aside from the fundamental difference concerning who makes the final decision, the two processes can sometimes appear quite similar (Bartel 663). A form of mediation that has much in common with arbitration is evaluative mediation, where negotiations focus narrowly on the legal and evaluative aspects of the dispute, and it is often favored by attorneys in commercial litigation. As Nancy Welsh has written, "[t]hrough their presence, their role vis-à-vis their clients, and their power over selection of mediator, lawyers have made mediation look more like the processes in which they are dominant – bilateral negotiation sessions and judicial settlement conferences" (Welsh 797-98). In this "law-centered" approach to mediation, commonly found in court-connected mediation programs, joint session is minimized in favor of "shuttle diplomacy" between separated parties, personal stories give way to arguments over legal rights, the parties' participation is subordinated to that of their lawyers, and the parties' interests are narrowed to legal terms and monetary values (McMahon 5-6). Mediators in this context are often selected for their skill in "evaluating" cases and presenting strategies for settlement based on their "expert" analysis of legal and technical norms, industry practice, and monetary values (Welsh 788-89). Because the mediator's evaluative role resembles that of an arbitrator, changing hats in the middle of the process represents less of a shift than it would in the broader interest-based ap-

proach to mediation. (See Appendix B for qualifications of the neutral)

### Evolution of Med-Arb

The development of med-arb reflects and parallels the larger societal trend that has increasingly linked judicial procedure with various forms of less formal, more expedient processes for resolving conflict, collectively known as “alternative dispute resolution (ADR).” The American court system has always had an interest in facilitating negotiation to settle a case prior to trial (Galanter 1-2). The rising quantity of disputes in the 1970’s elevated this interest and accelerated the trend in favor of mediation and other mechanisms for promoting settlement. Both federal and state court systems reached “a warm endorsement” of facilitated settlement as preferable to adjudication not only because of administrative convenience but also in the belief that a freely negotiated settlement will produce a higher quality of justice (Id.). With statistics showing that over 95 percent of court cases are settled without a trial, litigators have also come to “embrace the view that settlement is the goal” (Hoffman 19-20).

Like court process, arbitration has been subject to the same call for more expedient “alternatives” for resolving disputes. With many of the formalities of court adjudication, arbitration is criticized as “slow, expensive, formalistic, and unnecessarily adversarial” (Blankenship 35, Bartel 393). The growth of mediation in the 1970s and its extension to a wide range of commercial disputes resulted in the “growing interaction” of arbitration and mediation (Hoellering 23-24). For instance, the American Arbitration Association itself began to promote inclusion of mediation along with arbitration in standard construction contracts (Id.). An increasing number of commercial industries concluded that “combining mediation and arbitration in sequence can be a fair, efficient, and cost-effective process for resolving disputes” (Brewer and Mills 34). Throughout the business community it became common practice “to provide a mediation ‘window’” available to the parties at any stage of arbitration (Hoellering 24).

Med-arb is a natural outgrowth of this trend. In a dispute resolution environment where mediation and arbi-

tration often occur in sequential order, it makes sense to have the same neutral perform both functions, if feasible. This is particularly so when, in keeping with the law-centered model of mediation, the parties already expect the mediator to be adept at formulating optimal settlement strategies based on legal and technical norms and industry practice. In this context, the mediator already has tremendous power of persuasion based on his “expert” authority to evaluate the likely outcome of the case if it went to trial, and his knowledge of how other cases in the same commercial sector have settled. While the neutral in arbitration has the ultimate degree of decision making power by virtue of his authority to create a final and binding settlement, the evaluative mediator’s power to influence the settlement process may differ only as a matter of degree. This has led some to characterize the differences between mediation and arbitration as “artificial” (Blankenship 30, 34).

### Advantages of Med-Arb

From a process design perspective, the advantages and disadvantages of med-arb depend on the goals and values of the parties, as well as the personal goals and values of the third party neutral. What one party may see as a strength of the med-arb process (the power and leverage of the med-arbiter during mediation) may be viewed by another as a flaw (power that too often results in pressure tactics and “coercion” of a mediated settlement) (Blankenship 34-36). Accordingly, conflict professionals need to follow two essential guides. First, they must give clients sufficient understanding and information to make well-informed decisions about the risks and trade-offs inherent in this choice of process (Hoffman 35). Second, they must have “the skill and experience necessary to exercise this power appropriately” and avoid ethical dilemmas such as undue pressure or improper use of confidential information (Blankenship 35-37).

The central advantages of med-arb are the certitude of a defined outcome, greater efficiency in terms of time and money, and greater flexibility concerning process and timeline (Brewer and Mills 34).

### Finality

The most important attribute of med-arb is the *certainty of a final decision*, which of course is also the essential attribute of arbitration. The med-arbiter has complete authority to create a final and binding settlement, and this power is not available to the mediator (Blankenship 34). In addition, “[r]egardless of whether the final product of a med-arb results entirely from mediation or both mediation and arbitration, it becomes the entire [arbitral] settlement, which is binding and enforceable as law” (Blankenship 35).

### Efficiency

Med-arb can save time and money over separate sequential phases of mediation and arbitration in two important respects. First, if the mediation phase does not reach settlement, the parties and their lawyers do not have to hire another neutral unfamiliar with the case and then prepare for a full-blown arbitration. Second, the issues in dispute are frequently narrowed during the mediation phase and this forward progress can carry over directly into the arbitration (Blankenship 34).

### Flexibility

The flexibility inherent in med-arb allows the process to be fashioned to fit the dispute. Blankenship argues that while med-arb may not be suitable for every dispute, it is a leading example of “adaptive ADR” where “[the different ADR] forms become adaptable, combinable, reversible, and even discardable for the sake of the parties and their dispute” (Blankenship 29, 40-41). In the same vein, Hoffman asserts that “[o]ne of the reasons why one cannot rely on generalized claims of superiority of one [ADR] process over another is that the advantages of one process over another are largely situational—i.e., related to the specific circumstances of each case” (Hoffman 35). Hoffman provides a specific case example of how the flexibility to blend mediation and arbitration may sometimes serve the parties’ best interests:

...[T]he parties and counsel had intended to resolve their dispute—a breach of contract claim between two taxi companies—by mediation. However, after more than a day of

mediation, both sides became convinced that a definitive interpretation of their contract was needed, and they asked me to switch hats and arbitrate the dispute. Strongly held views on both sides, as well as intense anger between the principals of the two companies, made it difficult for either party to consider settlement, but they did see the value, from a business standpoint, of having the dispute resolved quickly and privately. (Hoffman 23).

As Hoffman’s example indicates, parties to an ongoing business relationship have a mutual interest in being able to resolve inevitable disputes expediently, privately, and in a fair, even-handed way so that they can move forward. Med-arb is an especially appealing option for disputes that the parties view as “irritants” to a valuable commercial relationship (e.g., manufacturer-distributor, joint venture, or marketing relationship) that both sides see as “more important than the stakes involved in such disputes” (Brewer and Mills 34).

### Concerns with Med-Arb

The two most important concerns with med-arb are the inherent potential for “coercion” and the risk that confidential information gained during mediation may taint the med-arbiter’s final decision. These are concerns that parties need to fully understand when considering med-arb as a process choice for resolving a specific dispute. The best safeguard available to prevent these concerns from materializing is to allow each party the right after the mediation phase to “opt out” of having the same neutral continue into the arbitration phase (Blankenship 37; Peter 98-99, 116). The potential loss in efficiency (i.e., the extra time and money required in shifting to a stand-alone arbitration) is justified by the important protection it provides to each party, and the incentive it provides for the med-arbiter to maintain impartiality (Id.).

### Coercion

When the power to decide the dispute is invested in the mediator, it gives him the power to pressure the parties

into settlement. Unlike the “ordinary” mediator using case evaluation, when the med-arbiter evaluates a case, it is highly suggestive of how the legal and factual issues of the case will actually be decided (Peter 95). And, when the med-arbiter “makes a settlement suggestion based on legal evaluation, this is basically a pre-decision” (Id.). The concern that this raises for some commentators is that “what appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment” (Peter 94-95).

This concern with a “coerced” decision loses force when the parties have made a free and informed choice of med-arb, a process that explicitly authorizes the third party neutral to impose a final binding decision (Blankenship 36). “Mediation with muscle” is a built-in tool available to the neutral, and the parties relinquish some power of self-determination when they give up their ability to “walk away” (Id). Moreover, as Blankenship writes, “any competent, ethical neutral must be sensitive to the line between appropriate pressure to settle and inappropriate coercion” (Blankenship 36). It is in the med-arbiter’s professional interest to gain the parties’ trust during the mediation, as they observe (1) his skill in using the mediator toolbox to support each party’s participation and (2) his even-handedness as they witness his reactions to the legal and factual issues (Hoffman 22-23). Strong-arm tactics by the med-arbiter would likely cause a party to feel unheard, disrespected, or unfairly treated, thereby impinging on that party’s sense that “justice is being done” (Welsh 820-26). Yet this potential for abuse exists in traditional mediation as well “if the neutral, due to incompetence or overzealousness, allows it to happen” (Blankenship 36). The imminent power of the neutral to render a decision does not *by itself* mean that the process during mediation is inherently coercive or that the party will feel “pressured” by how the med-arbiter facilitated the parties’ negotiation during mediation.

### Confidentiality

The second major concern with the med-arb process is that confidential information gained during mediation may inappropriately influence or be used by the neutral during arbitration (Blankenship 35). “The real premise of this criticism is that the med-arbiter cannot be complete-

ly neutral in the decision-making phase, having gained some information, perhaps unfavorable, in confidence in the mediation phase” (Id.). The abstract discussion in the literature as to whether the neutral as mediator can or cannot successfully “disregard” confidential information gained in mediation is of far less consequence than the parties’ *perception* of med-arbiter’s fairness and even-handedness in a specific case (Welsh 823). The competent and ethical conflict professional can protect parties considering med-arb by fully informing them of the confidentiality issue and explaining to them the “specific procedures and safeguards” available to address it, such as the ability of either party to opt-out after the mediation phase. Whether or not confidentiality will be significant depends more on the particular circumstances and challenges, and the parties involved, in a specific dispute. For example, if both parties are willing to commit at the outset that the parties will always remain in joint session in mediation and all issues will be out on the table, this diminishes the risk that confidential information will inappropriately influence the med-arbiter in reaching an arbitral decision.

### Ethical Issues – Self-Reflecting

In reading through the Model Standards of Conduct for Mediators there are no contradictions in the use of the Med-arb procedure. Studies of successful Med-arbitrators have recently revealed that they typically start the arbitration process as if there had been no mediation, hence building in an ethical dividing line (Telford 2000). That being said, both the AAA and JAMS do not recommend Med-arb using the same neutral (Phillips 2005). Each ethical question raised speaks to both the mediator standard of conduct and to each of us individually as we try to prepare ourselves for this dual role. Some of the following points have been discussed already, yet the following list of issues may help you discover your openness to using Med-arb with your clients.

*Mediator Neutrality*; Can the mediator remain unbiased and neutral during the mediation phase if she knows that she will have to make the final decision on unresolved issues?

*Coercive Influence;* Because mediation is voluntary and party centered, the mediator has few options for being directly coercive in the mediation process. When you combine Mediation and arbitration, it can create a situation where the mediator can put coercive pressure on the parties during the mediation via the threat of impending arbitration (Moore 387) (Telford 2000). What does this do to the mediation process and the relationship between all of those involved?

*Mediator Becomes Forceful;* Having the power of going to arbitration, may force the parties toward decisions that reflect the views of the mediator rather than their own. How does this affect the promise of self-determination in the mediation process?

*Mediator Undermines the Med process;* The parties may feel more inclined to concede to a forceful mediator. Would you as a mediator, with the power of final decisions, change your style of mediating, and how?

*Confidential Information Transfer;* Arbitrators flowing from the mediator role may carry information that has no business being in the arbitration. The argument asks how the arbitrator can possibly forget this information and act in an impartial way? How can an arbitrator not take into consideration final offer information gained during the mediation?

*Parties use Mediation as a Preparation for Arbitration;* Simply put, if the parties know it may go to arbitration, the mediation process may be affected by the parties trying to gain the sympathy of the decision maker early. Would you, as a party in a Med-arb, change the way you act toward the neutral? How does that effect you as the mediator?

*Parties hold back info;* Worrying that specific info may influence an arbitrator, parties may simply be less forthcoming during a mediation knowing that arbitration is to follow. Does this make the job of the mediator harder? Do the parties miss out on an opportunity?

*Trainings and levels of experience;* Arbitrators untrained in mediation have no business mediating. Mediators untrained in arbitration, or the specific area being discussed, have no business arbitrating. The point here is that by combining the two processes in one person it becomes harder to find a neutral that is qualified to run both processes well. Where would you draw the experience line in your Med-arb?

There is no way that these ethical dilemmas can be overcome in the model of Med-arb. However, with a properly skilled Mediator/Arbitrator, they can be minimized so that the parties can benefit from the advantages the med-arb process has to offer, which neither mediation nor arbitration can offer individually. (Telford 2000)

### Discussion of various hybrid forms of Med-arb

When discussing, researching, and exploring the possibilities of Med-arb, one can't help but notice that other combinations of mediation and arbitration may be a better fit for certain conflicts. Why not change the neutral midway, or bring in a mediator during the arbitration, or have the mediator hand the arbitrator her best opinion as to what should happen, or put the arbitration first? As the ADR world expands, it seems that the sky is the limit as to potential variations both within specific process models, and within and in between what some are calling "Hybrid" models. It is very exciting to open one's mind to what may be best for a particular set of clients and we invite you to study the Appendix A chart to help open some new possibilities in your mind. As you explore the chart, allow yourself to stay open to new possibilities beyond the hybrid models listed. Write down your thoughts as they come to you. Who knows, next weeks' clients may need a brand new process nobody has thought of yet...

### Conclusion

No matter the model(s) of dispute resolution you understand and practice, no matter if you are a Judge or a

volunteer mediator, you must ask yourself the question “what do my clients need and how do I help them get there?” each and every time you start a new case. If your answer is always the same, consider that you may not be serving all your clients in the best possible way. Given the right circumstances, med-arb has some enormous advantages over mediation and arbitration alone. Med-arb also has real and dramatic drawbacks if applied to the wrong conflict. It is up to each of us as conflict resolution professionals to understand the options available to our clients. We must understand as many of the intricacies involved as possible so that when we choose to use a specific mod-

el, hybrid or not, it fits, and works. Some of the med-arb drawbacks outlined in this paper may strike you as ethically un-resolvable yet we hope that as you add your own voice and imagination to the information we have presented, it will spark new ideas and twists that may allow you to find a place in your own practice for hybrid process. There are rules in the business we practice, but each and every day practitioners are finding new ways to break the rules, hold onto the standards they feel strongly about, and help their clients get to the place they need to get to.

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**Appendix A - Mediation / Arbitration Various Forms Explained;**

Although there are many potential variations within each of the processes listed here, this chart can be used as a quick reference guide for base comparisons of hybrid models of Dispute Resolution today.

Process Name	Managed By	How To	Key Features & Advantages	Major Disadvantages
Mediation (Med)	Mediator	Parties go through a negotiating process where the parties themselves decide what the solution is.	Interest based negotiation. Parties make final decisions. Potential for transformation. Long-term satisfaction with agreements. Saves time with no arbitration. Confidential.	May not come to agreement, so time may be wasted.
Arbitration (Arb)	Arbitrator	Parties present their arguments to a neutral who makes the final decision for the parties.	Third party settles dispute. Due process. Guaranteed decision. Finality. Quicker than litigation.	Arbitration can be time-consuming. Costly. Potential for unsatisfied parties and resurfacing of conflict.
Med-Arb (Pure)	One person is both the mediator and the arbitrator	Mediation takes place and if all issues are not resolved it goes to arbitration to decide remaining issues.	Continuity of ideas via same neutral. Good chance of long-term satisfaction with agreements. Guaranteed decision. Finality. Speed of settlement.	Fear of arbitration decision pushes parties. Can be time consuming and expensive. Confidentiality issues. Coercive issues.
Med-Arb Diff	Mediator and Arbitrator (two different people)	Mediation takes place and if all issues are not resolved it goes to arbitration to decide remaining issues.	Complete Separation of processes. Confidentiality is maintained. Guaranteed decision. Finality. Speed of settlement.	Can be more time consuming and expensive compared with Med-Arb (Pure).
Med-Arb Diff-Recommendation	Mediator and Arbitrator (two different people)	Mediator submits a recommendation to Arbitrator on unresolved issues.	Mediation insights flow into arbitration. Guaranteed decision.	Confidentiality and power of Mediator are in question.
Co-Med-Arb	Mediator and Arbitrator (two different people)	Mediator and Arbitrator conduct fact-finding hearing together followed by mediation without the arbitrator.	Mediator and parties get a sense of what arbitration may look like. Facts are put out early for all to see. Guaranteed decision.	Can be time consuming and expensive as both arbitrator and mediator are paid for all time.
Med-Arb-Opt-Out	Mediator and possibly new Arbitrator	After normal Med-Arb mediation stage, either party can call for a new arbitrator.	Gives control to parties for better neutrality, confidentiality and feel. Fairness in neutrality. Guaranteed Decision	Extra time needed for new neutral to "catch-up" with details. Can be time consuming and expensive.
Arb-Med Same	One person is both Arbitrator and Mediator	Arbitration concludes with sealed envelope of Arb decisions. Mediation then takes place to see if parties can settle without Arb decision.	All facts of the case are on the table prior to mediation. Guaranteed decision. Neutral needs no catch-up time.	Puts fear and uncertainty of decision into the mediation. Confidentiality issues.
Arb-Med Diff	Arbitrator and Mediator (two different people)	Arbitration concludes with sealed envelope of Arb decisions. Mediation then takes place to see if parties can settle without Arb decision.	All facts of the case are on the table prior to mediation. Guaranteed decision.	Puts fear and uncertainty of decision into the mediation. Catch-up time needed by neutral. Can be time consuming and expensive.
MEDOLA	One person is both Mediator and Arbitrator	Mediation and Last Offer Arbitration. After mediation, each party submits their last offer and the arbitrator must decide between the two offers.	Parties make the final recommendation based on their new knowledge in mediation. Parties are forced to make a reasonable offer. Guaranteed decision.	Limits the discretion of the Arbitrator. Can be time consuming and expensive.
Med Windows in Arb	One person can act as both or a new mediator can be brought in.	Process can move to mediation at any time within the arbitration in order to better understand and solve specific issues.	Parties are encouraged to mediate at strategic points. Creativity and flexibility are enhanced. Guaranteed decision.	Can be time consuming and expensive.
High-Low Med-Arb	Mediator and Arbitrator	The last offer each party makes during mediation transfers as the high/low amounts the arbitrator can award.	Parties maintain some control over final decision. No surprises. Guaranteed decision.	Can be time consuming and expensive.
Binding Mediation	Mediator	After mediated agreement is signed, mediator makes decision on all remaining issues.	Very quick settlement. Guaranteed decision.	Power of mediator diminishes neutrality. Lack of due process of law.

Most of the information in this chart was derived from two main sources; (Blankenship 2006) (Merrill 2007)

## Appendix B - Mediation / Arbitration Qualifications of the Neutral;

*Arbitrator Qualifications;* The qualifications for arbitrators and mediators is very similar. There is very little control, state or federal, over who can act as an arbitrator or mediator. There are arbitration selling groups, like the American Arbitration Association, that have standards for qualifications that their arbitrators must meet, but there is no over-arching governance for arbitrator qualifications. Arbitrators can be attorneys but they do not have to be (Oehmke 6). "As to Arbitrator qualifications... They vary based on program and state. They also vary based on industry. For instance, the construction industry has very different standards than an employment arbitration." "The one "requirement" seems to be that the arbitrator have some background in the subject matter." (Gehris DB). Susan Terry says "Virtually all arbitrators in the country are either attorneys experienced in the content area or practitioners of some kind in the field." Lipsky confirms this specific experience requirement, and lack

of training, in his findings of current lack of training programs in schools, courts, certificate programs, etc... for Arbitrators.

*Mediator Qualifications;* Mediators can be attorneys but don't have to be and in most situations the qualifications required to become a mediator are minimal. In some programs a forty-hour course is all that is required. The process of mediation is used in nearly every area of conflict imaginable and because of this, specific experience in the knowledge area being mediated sometimes adds dramatically to the level of expertise a mediator can bring to the process. There is a school of thought among some mediators that believes there is an advantage to the mediator having enough knowledge not to slow down the process, but little enough specific to the situation knowledge so as not to sway the decision making process. The level of specific knowledge need is a major difference in philosophies between some types of mediators and most arbitrators.

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### Works Cited

- Bartel, Barry C. "Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential," *Willamette L. Rev.* 27 (1991): 661-92.
- Blankenship, John T. "Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR." *Tennessee Bar Journal* Nov. (2006): 28-41.
- Brewer, Thomas J., and Lawrence R. Mills. "Combining Mediation and Arbitration." *Disp. Resol. J.* 54:4 (1999): 32-39.
- Federal Arbitration Act. US Congress. Modified 1990. Retrieved Nov 16, 2008 from <http://www.adr.org/sp.asp?id=29568>
- Friedman, Gary and Jack Himmelstein. "Resolving Conflict Together: The Understanding-Based Model of Mediation." *J. Disp. Resol.* 2006 (2006): 523-553.
- Galanter, Marc. "A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States." *Brit J L & Soc'y*, 12:1 (1985): 1-18.
- Gehris, Melinda. Moodle DB Post Nov 17 2008 Trends and Issues. Woodbury College MACS.
- Henry, Karen L. "Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes." *Ohio St. J. on Disp. Resol.* 3 (1988): 385-398.
- Hoffman, David. "Colliding Worlds in Dispute Resolution: Towards a Unified Field Theory of ADR." *J. Disp. Resol.* 2008 (2008): 11-44.
- Hoellering, Michael F. "Arbitration and Mediation: A Growing Interaction." *Disp. Resol. J.* 52 (1997): 23-25.
- Lewicki, Roy J., Alexander Hiam, and Karen Wise Olander. *When and How to Use Third Party Help*. New York: John Wiley & Sons, 1996, 436-453.
- Lipsky, David B, Rocco M. Scanza, Mary Newhart, and Richard D. Fincher. "Whose Job is it Anyway? Preparing Arbitrators for Consumer Dispute Resolution Programs." *ACResolution* 8:1. 2008: 12-15
- McMahon, Joseph P. "Moving Mediation Back Toward Its Historic Roots: Suggested Changes." *Colo. Law* June (2008) 23-36.
- Menkel-Meadow, Carrie, Lela P. Love, Andrea K. Schneider, and Jean R. Sternlight. *Dispute Resolution: Beyond the Adversarial Model*. New York: Aspen Publishers. 2005.

- Merrill, Peter, Kurt Dettman, and Jerome Landau. "Special ADR Processes Forms and Information." *Assoc. For Conflict Resolution 2007 Annual Conference*, Handout. October 24-27, 2007.
- Moore, Christopher W. *The Mediation Process*. San Francisco: Jossey Bass. 2003.
- Oehmke, Thomas. *Commercial Arbitration*. New York: Lawyers Co-operative Publishing Company. 1987.
- Peter, James T. "Note and Comment: Med-Arb in International Arbitration." *Am. Rev. Int'l Arb.* 8 (1997): 83-116.
- Phillips, Gerald F. "Same-Neutral Med-Arb: What Does the Future Hold?" *Disp. Resol. J.* 60:2 (2005): 24-33.
- Telford, Megan Elizabeth. "Med-Arb: A Viable Dispute Resolution Alternative." *Industrial Relations Center*. Queens University Press. 2000. 1-17.
- Terry, Susan. E-mail to Mark Baril 11/16/08
- Uniform Arbitration Act. National Conference Of Commissioners On Uniform State Laws. 2000.
- Welsh, Nancy. "Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?" *Wash. U. L. Q.* 79 (2002): 787-861.